



**IT IS ORDERED as set forth below:**

**Date: October 30, 2007**

*Mary Grace Diehl*

**Mary Grace Diehl  
U.S. Bankruptcy Court Judge**

In The United States Bankruptcy Court  
For the Northern District of Georgia  
Rome Division

In re	)	Case No. 07-42460-MGD
	)	
Kathy Darlene Boran,	)	Chapter 13
	)	
Debtor.	)	Judge Diehl

**ORDER DENYING MOTION TO IMPOSE STAY**

Debtor Kathy Darlene Boran (“Debtor”) commenced this Chapter 13 case on October 1, 2007, one day prior to a scheduled foreclosure sale on her residence. Because Debtor had two prior bankruptcy cases which were dismissed within the year prior to the filing of this case,<sup>1</sup> the provisions of 11 U.S.C. § 362(c)(4) are applicable and the automatic stay of 11 U.S.C. § 362(a) did not go into effect with the filing of Debtor’s petition. Notwithstanding the absence of a stay, the creditor, Rural Development, an agency of the United States Department of Agriculture

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<sup>1</sup>Case No. 05-43745 dismissed on February 21, 2007 for failure to fund Chapter 13 Plan and Case No. 07-41341 dismissed on August 3, 2007 for failure to pay a filing fee.

(“RD”), did not conduct the foreclosure sale scheduled for October 2, 2007. On October 2, 2007, Debtor filed a Motion to Impose the Stay under 11 U.S.C. § 362(c)(4)(B).

Section 362(c)(4)(B) provides that the Court may impose a stay, after notice and hearing, “only if the [Debtor] demonstrates that the filing of the later case is in good faith as to the creditors to be stayed.” Section 362(c)(4)(D) further provides in relevant part:

“For purposes of subparagraph (B), a case is presumptively filed not in good faith (but such presumption may be rebutted by clear and convincing evidence to the contrary) --

(i) as to all creditors if –

(I) 2 or more previous cases under this title in which the individual was a debtor were pending within the 1-year period;

(II) a previous case under this title in which the individual was a debtor was dismissed within the time period stated in this paragraph after the debtor failed to file or amend the petition or other documents as required by this title or the court without substantial excuse (but mere inadvertence or negligence shall not be substantial excuse unless the dismissal was caused by the negligence of the debtor’s attorney), failed to provide adequate protection as ordered by the court, or failed to perform the terms of a plan confirmed by the court; or

(III) there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous case under this title, or any other reason to conclude that the later case will not be concluded, if a case under chapter 7, with a discharge, and if a case under chapter 11 or 13, with a confirmed plan that will be fully performed;”

In Debtor’s current case, a presumption that the case is not filed in good faith arises because (1) Debtor had two previous cases pending within the one-year period; (2) Debtor’s prior Case No. 05-43745 was dismissed due to her failure to perform under the terms of a confirmed plan and (3) Debtor does not allege a substantial change in her financial or personal affairs since the dismissal of the last prior case, Case No. 07-41341.

A hearing on Debtor’s Motion was scheduled for October 24, 2007. Present at the hearing were Debtor and her counsel James McKay, and Laura Bonander, counsel for RD who opposed the motion. Edward Safir, counsel for the Chapter 13 Trustee, was also present. At the hearing, Debtor testified that she had lived in the property for twenty years. She further testified

that the last mortgage payment she made was in March 2002, more than five years prior to the filing of this case. She stated that she had tendered a payment of \$1,200 to Ben Davis, a representative of RD in 2005, but the payment was refused. Debtor also confirmed that in addition to the current case and the two cases that were dismissed within the past year, she was also the debtor in a fourth case, Case No. 04-41381, a Chapter 13 case which was dismissed at confirmation. Debtor failed to attend her Section 341 meeting of creditors in that case. Debtor indicated that she did not make any payments to RD during the three prior cases because she believed that the amount they were claiming was incorrect. Counsel for RD stated that the balance on its note at the present time is \$66,625. Debtor has scheduled the claim for \$30,354 with an arrearage of \$5,000. Debtor stated that she intends to pay the debt in this case because she realizes she is defeated. However, Debtor testified at length as to the disputes she has with RD. Debtor indicated she intended to pay the November mortgage payment but did not know the amount of the payment.

Debtor has not demonstrated a change in her financial circumstances. Debtor's income has not changed from the prior cases. The Form B22 for the current case, which includes a statement of income for the six months prior to the filing (April-September 2007) shows that Debtor's income is the same as it was when Case No. 07-41341 was filed.

Debtor has not demonstrated a good faith effort to utilize Chapter 13 to repay her creditors. Debtor made no payments to the Trustee in Case No. 07-41341, no payments to RD and paid only the first installment of the filing fee, resulting in the dismissal of the case. Debtor also did not appear for her 341 in that case. Case No. 05-43745 was confirmed by the Court in March 2006. In that case, Debtor did not appear at the original date scheduled for her Section

341 meeting, nor at the rescheduled hearing. A third meeting was scheduled and Debtor appeared. While that case was pending, Debtor paid \$1,500 to the Chapter 13 Trustee, which was approximately six months of payments. However, the case was pending for in excess of sixteen months. Debtor made no payments to RD during that case. RD filed a claim in that case for approximately \$19,000 of arrears. No objection to the claim was filed. Her first case, 04-41381, likewise had no payments to the Trustee, no appearance at the 341 meeting and no payments to RD.

In this case, Debtor would like the Court to believe that she intends to do what she has not done in the three prior cases solely on the grounds that she now accepts the fact that she must pay the current installments on her secured debt. Despite this statement, Debtor nonetheless testified at length as to the problems she has had with the prior conduct of RD and her continued belief that the amount of their claim is overstated. These statements makes her profession of changed intentions not totally credible.

As noted above, there is a presumption that this case was not filed in good faith. To prevail on her motion, Debtor must demonstrate her good faith by “clear and convincing evidence.” The “clear and convincing” standard of proof is an intermediate standard that lies between a “preponderance of the evidence” and “beyond a reasonable doubt.” SmithKline Beecham Corp. v. Apotex Corp., 2005 WL 941671, at \*7 n. 21 (E.D.Pa. Mar.31, 2005). Clear and convincing evidence is evidence that produces in the mind of the trier of fact an abiding conviction that the truth of the factual contentions is highly probable. E.I. du Pont de Nemours & Co. v. MacDermid, Inc., 2007 WL 2332161, \*8 (D.N.J. Aug.13, 2007) (not for publication); SmithKline Beecham Corp. v. Apotex Corp. 2005 WL 941671, at \*7; *see also* In re Ellis, 339

B.R. 136, 141-42 (Bankr.E.D.Pa.2006) (describing the standard as evidence “so clear, direct and weighty and convincing” as to enable the court to find the facts at issue “without hesitancy”).

Having heard Debtor’s testimony and having reviewed the dockets and pleadings in Debtor’s three prior cases, the Court concludes that Debtor has not rebutted the presumption that this case was not filed in good faith by clear and convincing evidence.

It is therefore ORDERED that Debtor’s Motion to Impose Stay is **DENIED**.

\*\*\*END OF DOCUMENT\*\*\*

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